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PRINCIPLES AND POLITICS IN LAW REFORM: SEXUAL OFFENCES IN SCOTS LAW*

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Introduction

In 2007 the Scottish Law Commission completed a project for the reform of Scots law on rape and other sexual offences.¹ The bulk, but by no means all, of the Commission's recommendations were enacted in the Sexual Offences (Scotland) Act 2009, which came into force in November 2010. Although this paper will have much to say on the new law on sexual offences, its main focus is on the process of law reform which led to this change.² In particular, the paper will address two general themes about law reform, in the sense of the systematic method of law reform adopted by bodies like Law Commissions. The first is that most good law reform exercise must identify the underlying principles which inform and structure the ultimate recommendations.

The second relates to the 'politics' of law reform. For this purpose 'politics' has two contrasting meanings. One is the external political context to the project itself; what political factors (if any) were involved in the project being initiated, in moulding the proposals for reform, in deciding whether or not to implement the recommendations, and determining the final form which the law would take in statute.³ In the case of the sexual offences project, politics in this sense was involved at all these stages, and it is impossible to understand how we now have the law in the form it is without being aware of these political factors. Many law reformers are wary of these political influences. Law Commissions spend considerable time and hard work in carrying any project through to completion. Yet, often enough, the strength and purity of their proposals for reform are often watered down in the political process of the passage of an implementing bill in the Scottish or UK Parliament. Worse still, the Government, whether in Holyrood or Westminster, might decide against legislative implementation of the recommendations of an entire project, often but not always, because it anticipates a hostile political reaction to any implementing bill.⁴

* I have benefitted considerably from comments by James Chalmers and Ken Reid on earlier drafts of this paper. The author was the lead Law Commissioner in the Scottish Law Commission's project on sexual offences which is the focus of this paper. While I hope all comments and recollections are accurate they represent my own views and no one else's.

¹ A consultative Discussion Paper (Scot Law Com Discussion Paper No 131) was published in January 2006 and the final Report (Scots Law Com Report No 209) in December 2007. (These documents will hereafter be referred to as Discussion Paper and Report.)

² Although this paper will inevitably touch upon some wider aspects of the Scottish Law Commission's functions and working practices, its focus is on the dynamics of a particular law reform project. For a thorough discussion of the Commission's general role in law reform, see George Gretton, "Of Law Commissioning" (2013) 17 *Edinburgh Law Review* 119.

³ This sense of the politics of law reform is a much wider topic and cannot be covered comprehensively in this paper. For an interesting discussion of law reform and politics from the perspective of the English Law Commission, see Stephen Cretney, "The politics of law reform – a view from the inside" (1985) 48 *Modern Law Review* 493. Cretney returned to some of the themes of that paper in S Cretney, "The Law Commission: true dawns and false dawns" (1996) 59 *Modern Law Review* 631.

⁴ For a long time a reason (or excuse) for not implementing Scottish Law Commission reports was the lack of Parliamentary time, a situation especially troublesome in respect of the pre-devolution Westminster Parliament. It was hoped that this problem would ease the setting up of the Scottish Parliament but these hopes have not been entirely fulfilled. Concerns about the low implementation rate were expressed in the Commission's Annual Report for 2008 (Scot Law Com No 214 (2009), p 5), though more recent annual reports have noted an

There is another sense of the politics of law reform, not party or governmental politics, but the internal politics of a law reform project. What factors decide whether a law reform body should deal with a particular topic, and what should be the scope of that project? And crucially for this sense of politics, what is the ultimate aim of a law reform project? There are two extreme views on this point. One is that a project should set out the very best recommendations for reform that can be identified. The substantive merit of the recommendation is what matters. Implementation is desirable, but is not the most important criterion of law reform. At the other end of the spectrum is the view that can be encapsulated by adapting Henry Thring's famous remark that 'bills are made to pass as razors are made to sell': as razors are made to sell, law reform projects are made to be implemented.⁵ This range of views is not meant to describe the psychological make-up of individual Commissioners. Rather, it represents a possible tension within any particular project. Part of the politics of law reform lies in how this tension is resolved.

Background to the reform of the law on sexual offences

The project began as a reference from the Scottish Government.⁶ Remarkably, perhaps, the background to the project was not concern about the low rate of convictions for the crime of rape.⁷ This claim might be met with incredulity. The issue about convictions must, it might be thought, have been the context of any reform of sexual offences. But the reality was very different. From the start the Commission's view was that the project was not aimed at the problem of the level of convictions for sexual offences. Nor was this issue mentioned by the Scottish Government when referring the matter to the Commission. This is not to say that it was envisaged that reform of the law would have no impact on conviction rates. It might well be argued, for example, that a clearer definition of the crime of rape could, as contrasted with the current law, lead to more guilty pleas than contested trials. But that was not what the project was about.⁸

Instead, the catalyst for the project was a decision of the High Court of Justiciary that the core of the definition of rape was sexual intercourse with a female victim without her consent, rather than also requiring that the accused had acted by 'force'.⁹ The problem was that the idea of consent in this context was new to Scots law but there was no definition or explanation of what it meant. A more immediate reason for the project was that difficulties soon emerged about the implications of the new definition of rape for the law of evidence in rape trials, issues which the media soon started to explore.¹⁰ While this media coverage was

improvement in the situation (see eg Scottish Law Commission Annual Report 2011 (Scot Law Com No 225 (2012), p 7).

⁵ Thring's dictum has a much more nuanced meaning than the somewhat cynical interpretation often given to it. For a fascinating discussion, see George Engle, " 'Bills are made to pass as razors are made to sell': practical constraints in the preparation of legislation" [1983] *Statute Law Review* 7. Engle explains that Thring's comment was a subtle joke derived from the work of the 18th Century satirist Peter Pindar.

⁶ Under the Law Commissions Act 1965, s 3(a).

⁷ For a discussion of the issues involved in assessing conviction rates in relation to sexual offence see J Temkin, *Rape and the Legal Process* (2nd edn, 2002), pp 11-30; L Kelly et al, *A gap or a chasm? Attrition in reported rape cases* (Home Office Research Study No 293 (2005)).

⁸ At the same time as the Commission was conducting its project, a separate study was being conducted by the Crown Office and Prosecution Service on prosecution practices in sexual offences cases, a project which was likelier to have implications for conviction rates. Contacts by the media and members of the public to the Commission suggested a level of confusion between the two projects. The COPFS report was published in 2006. Since 2009 COPFS has released annual bulletins on conviction rates for rape in Scotland.

⁹ *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466.

¹⁰ The key decisions were *McKearney v HM Advocate* 2004 JC 87 and *Cinci v HM Advocate* 2004 JC 103. For discussion of these decisions and the media reaction to them, see J Chalmers "Distress as corroboration of mens rea" 2004 SLT (News) 141.

continuing the Scottish Government made informal contact with the Commission to inquire whether it would be interested in undertaking a project on the reform of the law on sexual offences.

The two main sources of projects for the Commission are items which are part of its own programme of law reform and topics which are referred to it directly by the Government. These references usually involve a relatively short timetable, and if taken on by the Commission will be given priority over programme items. References are not at all infrequent and can be made for various reasons but it was obvious that in the present case a political dimension had been set by the media coverage. The Commission would have been rightly wary of taking on a project simply to get the Government out of political hot water but that was not how it saw the proposed reference (even though by kicking reform of the law on sexual offences out to the long grass of the Scottish Law Commission the Government might have bought itself some time and staved off some immediate political pressure). The Commission were very much aware that law on sexual offences had profound social and political dimensions and that working on this topic would involve high-profile media interest. But these were hardly reasons for not taking on the reference. The Commission had in any case already identified this area of law as one which needed its attention during its consultation on its next programme of reform.¹¹

The Commission agreed with the Government on the terms of reference which were to "examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences and to make recommendations for reform."

The terms of reference mentioned two matters, the substantive law of sexual offences and the law of evidence. Although the problems about proof in rape cases were the immediate spur of the Government's reference, in the event the Commission made no recommendations for reform in this area. On two issues, corroboration and character evidence, the Commission accepted that the law was in need of examination but that any law reform exercise should look at the general law of evidence and not how it applied only in respect of sexual offences. Another relevant topic was sexual history evidence. This part of the law had been revised in a recent statute whose workings were being assessed in a separate project. The Commission decided that it could not look at any further reforms until that project had been completed.¹²

Accordingly the bulk of the Commission's recommendations, and most of the provisions of the 2009 Act, dealt with the substantive law of sexual offences (actus reus, mens rea, and defences). But what sexual offences were within the scope of the project? Clearly not every type of sexual offence could be covered. That might be possible if the Commission were seeking to reform and codify the law on sexual offences but that was not what the Government were looking for when making the reference.

In agreeing the terms of reference to include 'other sexual offences' the Commission certainly had in mind a wide range of sexual offences and not just those similar to rape. But what else should the project examine? At the time the Commission took some fairly

¹¹ As part of this consultation a meeting was held with law academics where the point was made forcefully that the existing law on sexual offences was both incoherent and out of date.

¹² The report of that project, which was examining the Sexual Offences (Criminal Procedure) (Scotland) Act 2002, was published just before the Commission's own final report. See Michele Burman et al, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Scottish Government Social Research, (2007).

pragmatic decisions about what was to be excluded.¹³ In the event the Commission concluded that it would not deal with offences which were based on issues of public offence or public order. It did decide to include sexual exposure but excluded offences such as public indecency and voyeurism. In retrospect not dealing with voyeurism was a mistake, as provisions on this offence were added during the Parliamentary process of the 2009 Act, and it would have been better if the Commission had made recommendations on this offence which would have been consistent with the general principles underlying the whole project.¹⁴

Principles for reforming sexual offences

Principles for reform are an important part of any law reform process, but especially in relation to projects that involve wider social and political interests.¹⁵ An early stage in identifying principles for reforming 'sexual offences' came out of the process of determining what was included in this general category of crime. A useful framework was to be found in the modern literature¹⁶ where sexual offences are classified into three broad categories. First, there are offences which are concerned with promoting or protecting a person's sexual autonomy (for example, rape and indecent assault). Secondly, there are offences which seek to provide protection to persons who are vulnerable to sexual exploitation or about whom there are doubts concerning their capacity to engage in consenting sexual conduct (for example, statutory offences prohibiting sexual activity with a child or someone having a mental disorder). Thirdly, there are offences which seek to promote a social or moral goal other than those in the previous two categories (that is, autonomy and protection). Examples here are homosexual offences, incest, and sadomasochistic conduct.¹⁷

It was soon recognised that these categories were not only descriptive or analytical in nature but could also act as normative or justificatory principles. This was certainly true of the first two (sexual autonomy and protection) though the Commission was sceptical about whether the third category did constitute a sound basis for proposing law reform.

The process of formulating the underlying principles for the project illustrates another crucial element of most law reform work. This is that any project by a body such as the Scottish Law Commission is not done in a law reform vacuum. It is a key part of the strategy of any project to identify not simply what the law is in other legal systems but also the programmes on the relevant area of law by other law reform bodies. In fact, many law reform issues tend to be examined in different jurisdictions at about the same time.¹⁸ Law reformers do not

¹³ For example, in relation to prostitution and child pornography there had been both recent reviews by other bodies and also legislative activity. A wide-ranging review of legal and other aspects of prostitution had been conducted by an Expert Group which had reported in 2004. Some, but not all, of the Group's recommendation had been implemented by the Prostitution (Public Places) (Scotland) Act 2007. Provisions on child pornography are contained in the Civic Government (Scotland) Act (amended by the Criminal Justice (Scotland) Act 2003) and in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

¹⁴ See 2009 Act, ss 9 and 10 which were modelled on English law (Sexual Offences Act 2003, ss 67 and 68), but the provisions of both Scottish and English law have been subject to criticism (J Chalmers, "Two problems in the Sexual Offences (Scotland) Bill" 2009 *Scottish Criminal Law* 553).

¹⁵ At the same time, some projects especially on more technical or self-contained legal topics do not require any identification of principles in this sense. In such projects the mischief of the current law is obvious and the challenge for law reformers is spelling out the ways in putting it right.

¹⁶ There was particular value in the discussion in C Gane, *Sexual Offences* (1992), pp 1-6 and also a broadly similar approach used in the article on Criminal Law in the *Stair Memorial Encyclopaedia*, vol 7, paras 294-320 (1995).

¹⁷ Some of these offences can also be understood as based on other principles. See the discussion of incest below.

¹⁸ An interesting question, which cannot be pursued here, is why some issues do become topical for law reform across jurisdictions. Examples of such topics considered by the Scottish Law Commission included age of criminal responsibility and the insanity defence. In its age of criminal responsibility project the Commission drew

need to reinvent the wheel for every project they start. They can learn a lot from what other law reform bodies have previously thought about the topic which they are now considering. In relation to sexual offences the Commission had taken note of fairly radical reforms in the 1980s in various legal systems in the USA, Canada, and Australia.¹⁹ More recent law reform projects and legislative changes had occurred in South Africa, the Australian Capital Territory, and Victoria. Of particular significance were the recent wide-ranging changes to English law in the Sexual Offence Act 2003, which followed a thorough review of the law by a Home Office Working Group. The report of the group, *Setting the Boundaries*, had examined the principles and concepts relevant to reforming sexual offences,²⁰ and the Commission expressly acknowledged the value it had found in that report for its own project.²¹

Scrutiny of the projects elsewhere on reforming sexual offences, as well as examination of academic writings on that issue,²² led the Commission to formulate four additional principles for reforming the law. Altogether the following seven guiding principles were advanced as relevant for the project:²³

- (1) respecting and promoting sexual autonomy;
- (2) protecting people who might be vulnerable to sexual exploitation;
- (3) a possible further principle (other than autonomy and protection), which might be called legal moralism, in particular the view that the law on sexual offences should reflect public morality;
- (4) promoting clarity in the law;
- (5) removing distinctions based on gender and sexual orientation;
- (6) using types of legal intervention other than the criminal law;
- (7) categorising sexual offences according to the type of wrong involved in the conduct.

heavily on the comparative work which had been done by the Law Reform Commission of Hong Kong (see Scottish Law Commission, *Discussion Paper on Age of Criminal Responsibility* (DP No 115), 2001), paras 2.35-2.37. One of the stages in the project on the insanity defence was to hold a seminar to consider the experiences of people involved in similar projects elsewhere (see Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Report No 195 (2004), para 1.5).

¹⁹ SLC Report No 209, paras 1.6-1.8.

²⁰ *Setting the Boundaries: reforming the law on sex offences* (Home Office, 2000). The remit of the Home Office working group was wider than that of the Scottish Law Commission and included various issues which were examined in Scotland by COPFS (see footnote 8 above).

²¹ SLC Report No 209, para 1.8.

²² There were useful general discussions of reforming the law of sexual offences in D J West, "Thoughts on Sex Law Reform" in R Hood (ed), *Crime, Criminology and Public Policy* (1974) 469; B Hogan, "On Modernising the Law of Sexual Offences" in P R Glazebrook (ed), *Reshaping the Criminal Law* (1978) 174.

²³ It is perhaps surprising that the European Convention on Human Rights is not mentioned as an underlying principle. In fact, the Convention played a significant part in the progress of the project but considerations of the Convention have a much wider role than just this project. Since the devolution settlement the Scottish Law Commission has for all projects identified which Parliament has competence to enact the Commission's proposals for reform. Where the topic is within the competence of the Scottish Parliament each proposal must be compatible with Convention (Scotland Act 1998, s 29(2)(d)), and a statement that the Commission is satisfied that this is the case is made in every report which contains its recommendations for reform. Further, as will be noted later in this paper, the Convention underlies many of the principles for reform which the Commission had adopted.

These principles are not all of the same type. Whereas some are normative in nature and point to the ideal substance of reformed provisions on sexual offences (such as promoting autonomy and avoiding gender-based distinctions), others (such as clarity or categorising offences on the basis of distinct types of wrong) are more concerned with the structure and form of offences.

Another aspect of these underlying principles is that they may overlap. For example, respect for sexual autonomy is supported by making the law clear and by getting rid of gender-based offences. But at the same time there may be conflict between the principles, especially in the tricky question of fixing a boundary between protective offences and promoting autonomy. Using such guiding principles was not a matter of logical deduction but rather called for balancing and judgment.

But a fundamental point about all of these principles is that they were not regarded as self-evidently valid or appropriate. Each was identified as having a direct bearing on formulating proposals for reform. At the same time these principles attracted very little comment either by consultees in their responses to the Discussion Paper or in academic literature.²⁴

The point that requires some emphasis is that these principles must not be dismissed as mere rhetorical flourishes. The Commission's intention was that the principles for reform were intended to inform the whole direction of the project. Much of the following discussion explores the extent to which that goal was achieved, and the extent to which the 'politics' of law reform (in either sense of politics) got in the way of that goal.

1. Respect for sexual autonomy

In approaching the project the Commission saw respect for a person's sexual autonomy as perhaps the most fundamental value underlying proposals for the reform of the law of sexual offences. Sexual autonomy is not a straightforward concept but at its core is the idea that autonomy involves free choice in engaging in sexual conduct. The problem from the perspective of law reform lies in how the abstract principle of sexual autonomy can be captured in a legal framework. The Commission reached the conclusion that the best way forward was to link the exercise (or non-exercise) of sexual autonomy with the idea of consent. For the law to allow any form of sexual activity which involved the presence of the consent of those taking part was to promote their autonomy. But the law should also protect a person's sexual autonomy by criminalising all forms of sexual conduct which he or she did not consent to. Just as respect for sexual autonomy was seen as the fundamental principle of the project the idea of consent was regarded as the key concept in working that principle into specific norms of the criminal law.²⁵

Of course, those working on the project were well aware, first, of the vast literature on consent²⁶ and, secondly, of various criticisms made of defining sexual offences by reference

²⁴ They are discussed in C H W Gane, C N Stoddart, and J Chalmers, *A Casebook on Scottish Criminal Law* (4th edn, 2009), pp 361-363. By contrast, the approach taken by the Home Office Working Group in *Setting the Boundaries* was subject to critical comment; see eg N Lacey, "Beset by Boundaries: The Home Office Review of Sex Offences" [2001] *Criminal Law Review* 3.

²⁵ For a detailed account of the Commission's approach to framing a model of consent as a feature of promoting and protecting sexual autonomy see Discussion Paper, paras 3.1-3.44: Report, paras 2.1-2.35.

²⁶ For example, the collection of essays in Keith Burgess-Jackson, *A Most Detestable Crime. New Philosophical Essays on Rape* (1999) contains a selected bibliography running to 25 pages.

to the lack of someone's consent.²⁷ These criticisms to some extent overlapped, but the basic difficulty was that short of someone saying expressly 'I consent' there were problems in practical situations in determining whether consent to a sexual activity had or had not been given. Consent as an abstract concept was too much open to differences of interpretation, and very often these differences reflected unfounded or improper social beliefs (eg that a woman who is drunk or wearing revealing clothing is thereby expressing her consent to have sex). Another problem about consent was that by itself it might not fully capture all instances of failing to respect someone's sexual autonomy. The Commission gave the example of a woman who has sexual intercourse with a man because she has been threatened with violence. Here it could be said that in one sense the woman had consented to intercourse but the point is that she did so for reasons which made the consent invalid.

However, the Commission did not believe that these criticisms were fatal to all consent models. Much would depend on the details of the approach taken to use consent (or lack of it) as a key constituent in framing sexual offences. At a theoretical level much weight was given to the point that sexual activity (or at least the forms of interest to the criminal law) involved more than one person and hence was a form of social interaction.²⁸ In devising a model of consent emphasis was to be placed on how one person sought or was aware of the consent of another person in respect of any sexual activity between them. As the Commission explained in its Discussion Paper:²⁹

"Where one person engages in sex with another without her consent there has not been an appropriate form of interaction between them. Engaging in sexual activity without the consent of another person is a particular form of wrongdoing to that person."

This theoretical perspective gave rise to a model of consent which was of an 'active' (or positive) type. This model did not adopt a one-sided view of consent which concentrated on only one person (usually a woman) who was to give consent but rather on both parties. The focus was on determining that both parties gave consent and on the steps which each took to ensure that consent was present before any sexual activity took place.

The next step was to formulate a set of proposals which would embody this model of consent. After examining provisions on consent in other jurisdictions,³⁰ the Commission recommended a two-tiered approach for Scots law: first there should be a general definition of consent, and secondly a list of specified factors which indicate when consent does not exist.

Consent: general definition

Following the law in Victoria, the Commission recommended that there should be a general definition of consent as 'free agreement'. This definition was seen as having the merit of being short and using relatively straightforward language.³¹ Both elements of the definition

²⁷ For detailed discussion see Discussion Paper, paras 3.8-3.16.

²⁸ In formulating this approach the Commission found much of value in J Gardner and S Shute, "The Wrongness of Rape" in J Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (2000) 193.

²⁹ Discussion Paper, para 2.4

³⁰ The Commission examined consent models in England and Wales, Canada, California and New South Wales. The law found most useful was that of the State of Victoria.

³¹ This is in contrast to the general definition adopted in other jurisdictions. See, for example England and Wales: "For the purpose of this Part a person consents if he agrees by choice, and has freedom and capacity to make

are important. An 'agreement' involves more than one person, thereby bringing in the idea that consent in sexual activities involves social interaction. There was concern expressed to the Commission that using the term agreement might bring with it the idea of a contract. This would have been undesirable for, unlike a legal contract, it should be possible to withdraw consent at any time before or during the sexual activity consented to. But it was doubted whether anyone other than a lawyer would think this way.

Moreover, another advantage of a general definition of consent as free agreement was that it excludes instances where someone submitted or agreed to have sex because of threats or unfair pressure. In such cases, a person may have agreed, but this does not amount to free agreement.

Consent: particular definitions

The next element of the consent model was a list of particular definitions. The proposed list contained seven factual situations. It is important to bear in mind what this list does and does not do. Each item on the list constitutes a situation which defines when a person has not consented to sexual activity. Unlike similar looking provisions in English law they are not evidential presumptions but rules of law.³² Moreover and crucially, the list is not to be seen as exhaustive of the situations where consent does not exist. It was envisaged that there would be many types of factual situation not on the statutory list, which might also involve lack of consent as 'free agreement and hence be governed by the general definition.

There were two additional recommendations on consent. The first was that consent to any particular sexual activity should not be held to imply consent to another form of sexual activity.³³ A second was that consent to any sexual activity could be withdrawn at any time prior to the completion of that activity.³⁴

Most of these recommendations on consent were implemented in the 2009 Act.³⁵ But do they achieve the Commission's aim of promoting sexual autonomy by the use of a 'positive' model of consent? In my view this general principle did structure the Commission's recommendations and their statutory implementation. The whole notion of free 'agreement' suggests that consent is something that is not only positively expressed but also involves both parties (it takes more than one person to make an agreement). The very fact that the Act expressly states that a person does not consent to sexual conduct where they agree or

that choice (Sexual Offences Act 2003, s 74). It should be noted that this provision did not follow the recommendation of the Home Office Working Group which had proposed a general definition of consent as 'free agreement' (*Setting the Boundaries*, vol 1, para 2.10.5).

³² This is in marked contrast to English law. The Sexual Offences Act 2003 contains six rebuttable presumptions about consent (s 75). Again the Act did not give effect to the views of the Home Office Working Group whose recommendation was similar to that made by the Commission (*Setting the Boundaries*, vol 1, para 2.10.6). The experience of that Act in practice has suggested that the presumptions have only a very limited value in proving lack of consent in the prosecution of sexual offences.

³³ This recommendation was intended to make clear that the law did not accept any notion of implied escalation of consenting to different types of sexual activity. Consenting to a kiss does not imply consenting to oral sex.

³⁴ It was never clear whether Scots common law recognised the principle that where a man has consensual intercourse with a woman and during the intercourse she indicates that she no longer consents to it, then if the man continues with the intercourse he is guilty of rape. This is the law in other jurisdictions. See, for example, *Kaitamaki v R* [1985] AC 147 (PC) (New Zealand).

³⁵ Sexual Offences (Scotland) Act 2009, ss 12-16. Section 12 contains the general definition of consent as free agreement, and section 13 sets out most of the Commission's proposed list of particular definitions.

submit to it (eg) because of the threat or violence or because of deception as to its nature or purpose indicates that consent is not a one-direction concept.³⁶

A similar approach applies to the rules that consent to one type of conduct does not of itself imply consent to any other conduct and that consent once given can be withdrawn before or during such conduct.³⁷ For example, where a woman and a man engage in consented-to sexual touching the man cannot infer that by doing so the woman had consented to penetrative intercourse. If that is what the man wants to do, he must seek the woman's consent to it.

An even clearer illustration of this co-operative model of consent is in the provision on mens rea in relation to consent.³⁸ For many of the offences in the Act there is a requirement that the accused lacked any reasonable belief that the other person was consenting to the sexual conduct. The notion of a belief being reasonable at the very least suggests the use of objective criteria but the provision also expressly calls for having regard to whatever steps the particular accused took to ascertain whether the complainer was consenting.³⁹

The detailed recommendations on this model of consent do indicate the extent to which the principle of promoting and respecting sexual autonomy informed the Commission's thinking. But there were two particular areas which caused potential problems, each arising out of situations where it would difficult to assess whether someone could be sexually acting in a way consistent with autonomy. The first, and much more problematic, was sexual activity when a person was intoxicated and the second, sex with someone who was asleep.

The issue of the drunken complainer⁴⁰ in sexual offences poses some fairly direct problems about the notion of autonomy and choice in the context of sexual activity.⁴¹ There is also the wider social context of alcohol consumption and the existence of social beliefs that women who are drunk are somehow to blame for getting involved in unwanted sexual activity.⁴² It can be accepted that mild intoxication does not affect the capacity to make autonomous choices. Equally clearly, there are states of extreme intoxication, still short of lack of consciousness or automatism, where 'consent' to any activity, including sexual conduct, could not be based on autonomy. But the real difficulty is that there are many states of intoxication between these two extremes cases. In short, it all depends how drunk any particular person is at the time of 'consenting' to sexual conduct. In seeking to develop a model of consent based on respecting sexual autonomy, the Commission could see no formulation that could be more precise than that. At about the same time English law had

³⁶ 2009 Act, s 12(2)(b), (d) (particular definitions).

³⁷ 2009 Act, s 15(2), (3).

³⁸ 2009 Act, s 16.

³⁹ Report, paras 3.69-3.78. The Commission was particularly keen to avoid the approach used in English law (eg Sexual Offences Act 2003, s 1 (mens rea of rape)) that whether a belief as to consent was reasonable is to be determined by 'having regard to all the circumstances', which might bring in a purely or mainly subjective test of reasonableness. For criticism that the Scottish provision does not exclude consideration of subjective factors see J Chalmers, *The New Law of Sexual Offences in Scotland* (2010), pp16-17

⁴⁰ A different set of issues concerns the drunken accused but this was not a matter which the Commission could deal with in this particular project.

⁴¹ There are good discussions of the issues in E Finch and VE Munro, "The Demon Drink and Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants" (2007) 16 *Social and Legal Studies* 591 and S Cowan, "The trouble with drink: (in)capacity and the evaporation of consent to sex" (2008) 41 *Akron Law Review* 899

⁴² See, for example, the data referred to in Report, para 2.62. For a more sceptical account of these so-called rape myths, see H Reece, "Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?" (2013) 33 *Oxford Journal of Legal Studies* 445

developed more or less the same position.⁴³ Yet, the Commission were very reluctant to leave out any reference to intoxication from the particular definitions of consent, not least because the presence of drunken people was the likely scenario when these questions would most often arise in practice. Accordingly, one of the recommended particular definitions of a situation where there was lack of consent was:

"where the only indication or expression of consent by B to the conduct occurred at a time when B is incapable, because of the effect of alcohol or any other substance, of consenting to it."

At one level this definition states the obvious. Where someone is so drunk that they cannot consent to sexual activity then any ensuing sexual activity is not consent-based and any statement of consent is not consent in the sense of free agreement. But a legal rule to this effect is not vacuous, for it sets out a reminder or warning to anyone contemplating sex with someone who is or has been drinking that any sexual activity with that person may result in their committing an offence based on lack of consent. The Commission's view was that there was nothing inappropriate in the criminal law sending out this sort of social message.

The formulation of the rule favoured by the Commission also involved another issue about consent and autonomy. The rule focused on the time when the expression of consent is made. If at that time the person is so drunk that she cannot consent, then there can be no consent. But a further question is whether a person can consent when sober now to do something at a later period when their ability to consent may be lacking because of the consumption of alcohol. The Commission could not see how someone having sex when drunk based on consent given when sober earlier could infringe sexual autonomy, at least when the parties anticipate that they or one of them would later get drunk. Indeed, this might be a common pattern of social and sexual behaviour in our society.

However, this approach was subject to attack during the parliamentary process of the Bill and the Commission's recommendation on this point did not survive into the final version of the Act. The particular definition of lack of consent where a complainer was intoxicated was changed to the following:

"where the conduct occurs at a time when B is incapable, because of the effect of alcohol or any other substance, of consenting to it."

The catalyst for this change was evidence presented to the Justice Committee of the Scottish Parliament in its consideration of the Bill, and in particular the idea that there is an absurdity in the idea that someone can consent to having sex at a later time when at that time they would be too drunk to give consent. The whole idea that there could be advance consent to sexual activity was said to be both absurd and dangerous.⁴⁴

However, it is difficult to see any sound basis for these views. Far from rejecting the idea of advance consent what the new law ought to have been emphasising was that there must *always* be consent to sexual activity before that activity takes place. Indeed, the Commission identified as one of the more worrying social myths the notion that women are inviting sex simply because they are drunk. A man should not be allowed assume that a woman wants

⁴³ *R v Bree* [2008] QB 131, especially paras [34] - [36].

⁴⁴ For discussion of these developments during the Parliamentary process, see Alastair N Brown, *Sexual Offences (Scotland) Act 2009* (2009), pp 39-40.

to have sex with him simply because she is drunk. If he wants to have sex with a woman he should ask in advance and not just assume that the woman is consenting. The rhetoric that there cannot be consent in advance itself sends out a dangerous message.

Furthermore, the changed provision itself fails to respect sexual autonomy and can lead to some absurd results. Where two people consent to having sex with each other later in the evening and then get drunk, it is difficult to see why the law should interfere with their autonomy and prevent them from doing so. But this provision goes further than not letting people make choices as to sexual conduct. Its effect is that all sexual activity involving someone who at that time is 'incapably' drunk is by definition non-consenting and hence criminal, even if that party had earlier expressed consent to doing exactly that and has given no indication of having changed their mind. In short, Scots law does not allow for anyone to knowingly and freely choosing now to have sex with someone else at a later time when he or she will be so drunk as to lack capacity to give consent at that later time.⁴⁵

Nor is it a proper response to say that such concerns are purely theoretical because in practice where people engage in drunken sex (even though the law deems it to be without consent) and have no later regrets, the criminal justice system law will not be involved. This approach is inappropriate for two reasons. First, law reform should not result in a situation where an offence is created but also accepts that in many or possibly most cases there will be no consequent criminal prosecution. If conduct is not only common but will be subject to criminal sanction in only rare cases, questions must be asked why it has been criminalised at all. Secondly, drunken sex where the parties have agreed to do so at an earlier stage when sober could well come to the attention of the police, eg where it is carried out in a public place.⁴⁶

An issue similar to 'consented to' drunken sexual conduct arises from section 14 of the Act. One of the particular definitions as recommended by the Commission was that there is no consent by B where:

"at the time of the conduct, B is asleep or unconscious, in circumstances where B has not, prior to becoming asleep or unconscious, consented to the conduct taking place while B is in that condition."

Before the Justice Committee this definition was subject to the same argument that there cannot be 'prior consent' to later sexual activity. The definition was replaced with a separate provision that in relation to all sexual offences where lack of consent is a defining element:⁴⁷

"A person is incapable, while asleep or unconscious, of consenting to any conduct."

As a general proposition the validity of this statement is highly questionable. There are many scenarios where activity with a person who is asleep or unconscious does not imply lack of consent. Most surgery involving anaesthetic would be impossible if this were otherwise. The difficulty with this provision is an ambiguity in the word 'consenting'. This could refer to the act of expressing consent, in which case the provision states an obvious

⁴⁵ This is subject to an important caveat that where A and B freely agree to have sex later and B is very drunk at the time of the sexual activity, A may lack mens rea by having reasonable grounds for believing that B has consented.

⁴⁶ Of course, the possibility of there being no consent in this situation would arise where the earlier consent was not to having sex in a public place.

⁴⁷ 2009 Act, s 14(2).

truth. Alternatively, 'consenting' could refer to being in a consenting state, for example where consent was expressed at an earlier stage to having sexual contact while asleep. The language of the provision seems to suggest the first interpretation and this was confirmed by the words of the Cabinet Secretary when introducing the amendment which became section 14.⁴⁸

However, this leaves open the possibility that the law still allows for someone to give advance consent to sexual activity when later asleep or unconscious, as contained in the Commission's own proposal. So it is far from obvious why that possibility should now be governed by the general definition of consent as free agreement rather than being explicitly spelled out in a particular definition. Furthermore, if this is the correct interpretation of section 14 there is a tension between the policies underlying the provision on drunken sex and that for sex while asleep. For drunken sex the policy clearly was to disallow the effect of expression of consent made before the sexual conduct, while that possibility is retained for sex while asleep. If, on the contrary, the correct interpretation of section 14 is that advance consent to sex while asleep is to be disregarded, then the same criticisms can be made, namely that it renders criminal a form of consenting sexual activity which is probably not uncommon in practice.

In summary, the amendments made to the Commission's proposals were unhelpful in that they resulted in limiting the principle of respecting and promoting sexual autonomy which the consent model was meant to reflect. It is also doubtful if the amended provisions have increased the clarity of the law; if anything, they may have brought greater uncertainty. From a more general law reform perspective, some lessons can be learned about the design of law reform projects, especially the need for the Commission to engage more fully in the post-Report political and parliamentary process. For many projects informal contacts were maintained between the Commission team and the civil servants who had responsibility for the introduction and progress of a bill through Parliament (what in the Commission was called 'after-sales' service) but at the time of the sexual offences project these contacts tended to be ad hoc.⁴⁹ Representatives of the Commission itself did present oral evidence to the Justice Committee, which sought to explain and justify the Commission's detailed recommendations.⁵⁰ And, on the whole, the law on consent as contained in the 2009 Act follows closely the Commission's proposals. But the possibility that objection would be taken to the very idea of 'advanced' consent was not one which was identified in the consultation process that preceded the Commission's final recommendations.

2. The protective principle

A second guiding principle for the project related to special legal provisions for people, particularly children and the mentally disordered, who may be vulnerable to sexual exploitation and abuse. Scots law has for long contained separate offences criminalising

⁴⁸ "The new section that amendment 77 introduces replicates our understanding of the current law by providing that someone who is asleep or unconscious cannot give consent while in that state. The new section provides that consent cannot be given in such circumstances." (Cabinet Secretary for Justice, Kenny MacAskill MSP, Justice Committee Official Report (24 March 2009, cols 1662-1663).)

⁴⁹ More recently the Commission has noted a greater level of contact with the Scottish Government and the Parliament in respect of implementing Reports (see eg Scottish Law Commission Annual Report 2012 (Scot Law Com No 230 (2013), pp 8-9; 13-14).

⁵⁰ Scottish Parliament, Justice Committee Official Report 18 November 2008, cols 1358-1374.

sexual contact with children and those with mental disorder based on the need to protect them. But there is a possible conflict between protecting the vulnerable from exploitation by others and respecting their own sexual autonomy. On one view the protective principle added nothing to the autonomy principle, and these separate offences are no longer necessary once the law has adopted a refined model of consent for sexual offences. Whether someone was young or older and whether or not they had a mental illness, the focus of the criminal law should be whether they gave consent to sexual activity. Indeed, not allowing children or the mentally disordered to engage in sex when they had consented to do so is an infringement of their sexual autonomy.

This conflict was recognised within the Commission but nonetheless the ultimate decision was to retain and expand offences based on a protective principle, even if a richer model of consent were to be introduced. There were two core but contrasting reasons behind this decision but in retrospect it is not clear that each involved giving effect to a protective principle.

The first involved situations where as a matter of policy the law holds that a person cannot consent to sexual conduct, for example children under a certain age or people with a severe mental disorder. One approach here is simply to refine the consent model by adding definitions of 'no consent' to cover these cases.⁵¹ However, a different approach was taken in respect of consent by children under the age of 13 ('young children'). Here again the view was that a child within this age-band cannot consent to sexual activity but the Commission recommended that cases involving children of this age should not be subsumed under the general no-consent offences. Instead there should be a separate range of offences against young children which parallel the general offences but which, crucially, make no reference to lack of consent as a key element of the definition of the offence. In its Report the Commission described this approach as part of the protective principle but it is more accurate to say that the justification for these offences lies in another key principle for reform, namely, categorising sexual offences according to the type of wrong involved in the conduct.

The point about sexual activity with young children is that this conduct involves a particular type of wrong, which is not brought out simply by saying that the conduct does not involve the lack of consent by the child. The consent model is tied to the idea of protecting sexual autonomy but in the case of a sex with a young child more is involved than the fact of lack of consent. The law takes the view that children of a certain age do not in fact have, or are deemed not to have, the capacity to consent to sexual activity. There are different wrongs involved in having sex with a person who could have but did not consent to it and having sex with a person who could not consent at all. The point of offences of this type is to mark out a very distinctive form of wrongdoing: young children are not the objects of sexual conduct.

Different considerations apply in respect of sexual offences involving so-called older children (ie children aged over 13 and under 16). Here the protective principle comes directly into play. In such cases the offence occurs where the child has given consent but the law nonetheless prohibits *someone else* having sex with a child of this age. The justification for

⁵¹ In the event that is what the Commission recommended in relation to people with mental disorder: see 2009 Act, s 17 which states that a person with a mental disorder lacks capacity to consent where because of the disorder he or she lacks the ability to perform various activities concerning understanding conduct and forming and communicating decisions. The important point to note is that where there is such incapacity any offence will be one of the general 'no consent' offences contained in sections 1-9 of the Act rather than particular offences dealing only with people with a mental disorder.

such criminalisation is to protect older children, who are capable of giving consent, from situations of being exploited because of their immaturity. As the Commission put it, it prevents older children having sex for bad reasons.⁵² If this is paternalism, then paternalism is not out of place when dealing with children. Further, by having specific offences relating to consent-based sex with older children the law sends out a message that this sort of exploitative conduct is wrong.

In adopting this approach the Commission was well aware that having offences which prohibited consent-based sexual conduct could be seen as contravening the principle of respecting and promoting sexual autonomy. If the law grants children of a certain age the capacity to consent to sex, then children should be allowed to exercise this capacity, and any problem about whether in any particular case a child had given 'genuine' consent would be alleviated by the introduction of a more detailed set of provisions on what constitutes consent. Nonetheless, for the sorts of reasons mentioned earlier the Commission concluded that the protective principle should override the respect for autonomy principle for these particular provisions.

Subject to one specific proposal on sexual conduct between older children (considered later), the recommendations on offences relating to children were broadly accepted during the parliamentary process and were enacted in virtually the form which the Commission had proposed.

However, to say that the Commission took the view that for the older children provisions greater weight should be given to protection than to autonomy disguises a tension with the Commission's deliberations. To explain this point, it is necessary to set out the working methods of the Commission in its law reform projects.⁵³ Unlike the position with the Law Commission in England and Wales, the Scottish body does not have fixed subject-matter teams. Rather for each project a team is assembled consisting of the Commissioner in charge of the project, a project manager from one of the civil service staff who are seconded to the Commission, and a research assistant.⁵⁴ Progress reports from each of the on-going projects are made to Commission meetings, which are held on a periodical basis,⁵⁵ and where drafts of consultation papers and final reports are also considered.

It became clear at an early stage of the sexual offences project that while the proposals in respect of young children were generally accepted, one Commissioner was opposed to the use of the protective principle and the proposals for offences relating to older children. What then happened was typical of the story of many projects, namely that Commissioners would meet each other to discuss business informally before and between Commission meetings. Law reform bodies have a very strong desire to achieve unanimity of views on all the final recommendations which are to be made for a project. Informal discussions between the lead

⁵² Examples given in the Report (para 4.47) are where a boy of 13 consents to sex with a man aged 52 in exchange for money or an iPod, or a where a man of 40 chats up a girl of 13 and then has sex with her. The reference to an iPod perhaps dates the Report.

⁵³ For a more detailed discussion of the workings of Commission projects see Gretton, *op cit* at footnote 2, pp 138-140.

⁵⁴ The present writer was Commissioner throughout sexual offences project. There were two project managers (both male) and four research assistants (three female and one male). At the time of project no woman had been appointed as a Scottish Law Commissioner.

⁵⁵ Historically these tend to be held on Mondays, presumably reflecting the practice that Mondays were not days on which the Court of Session sat. Commission meetings are rarely held during the summer vacation period. For further discussion of Commission meetings, including the desire to avoid expressions of dissent in the final report see Gretton, pp 137-138.

Commissioner and known or likely dissenters are adopted as one way of trying to achieve unanimity. Of course, this approach represents the dynamic of virtually any collective decision-making body. In my experience at the Scottish Law Commission, these informal discussions were frequent. Commissioners wanted to know in advance of Commission meetings the likely support (or opposition) there would be for proposals which might be controversial. Whilst there was nothing as crude as deals done to drop opposition to a proposal in one project for support in another, the backdrop was that lead Commissioners on most projects would take informal soundings from other Commissioners on the existence or level of support or opposition to proposals. This involved an implicit understanding that there would be mutual exchange of support (or dropping of opposition) across projects to help bring about a unanimous final decision on all projects.

I should stress that in the sexual offences project, achieving unanimity on the proposal for using the protective principle for older children offences was not based on any sort of explicit or implicit deal. The Commissioner involved was not personally convinced of the reasons put forward for these offences but accepted that the need for unanimous recommendations on a key part of the whole project outweighed any point in insisting on his position.

3. Legal moralism

As noted earlier, the Commission had identified three general descriptive principles which helped to explain the nature of the existing law of sexual offences in Scotland. Two of those, respect for sexual autonomy and the protective principle, were in addition considered as useful normative principles in guiding the approach to recommending reform. The situation was different in respect of the third such explanatory principle, which was termed 'legal moralism'. Many existing offences appeared to be based on something other than promoting autonomy and protecting the vulnerable, for example offences criminalising consenting homosexual conduct, incest, sado-masochism, and bestiality. Nor could these offences be explained or justified by any of the other guiding principles which were used in the project.

The Commission was not inclined to accept as a proper basis for law or law reform the idea that something should be criminal simply because some or many people thought it was wicked or bad. The Commission made recommendations on several of the offences which were classified under this heading. Two of them, homosexual offences and sado-masochism, are considered later. Here the focus is on the recommendations for reform of the offence of incest, which throws interesting light on both the external and internal politics of law reform.

A first and crucial point about the offence of incest in Scots law is that it overlaps with many other sexual offences.⁵⁶ Sexual activity between members of the same family where one of the parties has not consented is covered by the offences of rape and sexual assault. Similarly the offences which deal with sexual activity involving both younger and older children apply where the parties are related to each other. As the Commission noted,⁵⁷ the only type of activity which incest prohibits which would not be subject to another criminal sanction is sexual intercourse between consenting adults who are of different gender and within the prohibited degrees of relationship.

⁵⁶ It should be noted that incest in Scots is restricted to penile-vaginal penetration between a defined set of blood relatives.

⁵⁷ Discussion Paper, para 6.11.

Against this background, the Commission was minded to raise the question whether incest should be retained as a separate offence. In the consultative Discussion Paper it was strongly emphasised that this question was not concerned with non-consenting sexual activity between family members and was certainly not concerned with sexual contact between parents and (non-adult) children. The Commission's view, as made clear in its other proposals, was that such activities are wrong, and should be subject to direct and clear prohibition by the criminal law. Nor did the Commission make any direct proposals in the Discussion Paper for changing the law of incest. Instead it set out arguments both for and against an offence on incest and followed that with two questions. First, whether in addition to offences based on lack of consent by the victim and offences based on a broad protective principle there should continue to be a separate offence of incest. And, if there should, for what reasons?

The response was in one sense disappointing but perhaps not too surprising. Almost all consultees favoured a continuing offence of incest but it was often difficult to discern any clear ground for this view other than some or other form of legal moralism.⁵⁸ At the same time, it became clear that there was a considerable strength of feeling about abolishing the crime of incest, even where it was proposed to retain and indeed strengthen offences dealing with child and intra-family abuse. It also became obvious that continuing to explore the abolition of the crime of incest might distort the focus of the project. Whilst the Commission could see no obvious principle for retaining the existing law, it was thought safer to retreat from this issue, and the Final Report simply states that the Commission made no recommendation for any change to the law on incest.

The Commission's failure to propose any reforms on incest has been the subject of criticism, based on a form of intellectual incoherence or even cowardice. Indeed one writer has argued that not one of the Commission's guiding principles supports its conclusion not to alter the law.⁵⁹ There is much in this criticism but it fails to capture the perspective through which the Commission approached this particular issue. In its Discussion Paper the Commission drew explicit attention to the fate of other law reform projects, in particular a recommendation to decriminalise consenting sexual intercourse between adult relatives as part of a proposed Model Criminal Code in Australia.⁶⁰

⁵⁸ An exception to this trend was to be found in the views of several consultees who argued that incest between adults is never, or only very rarely, consenting. Incest often begins when a child is below the age of consent and continues when the child reaches that age. As the point was put in an article by Jennifer Temkin: "abuse does not cease to be abuse the moment the victim reaches a prescribed age. Many women will find it impossible to extricate themselves from such relationships." (J Temkin, "Do We Need the Crime of Incest?" 1991 *Current Legal Problems* 185 at p 187.) However, counter-arguments are that this situation is the basis for an offence which penalises abuse of trust within a family setting, even where the victim is older than 16. If the mischief is to protect the person whose consent is open to question, it should be done other than by the crime of incest, which attaches criminal liability to all the participants (cp J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] *Criminal Law Review* 347 at pp 357-358.)

⁵⁹ See in particular JA Roffee, "Incest: the exception to a principled Scottish sex law" 2012 *Juridical Review* 91, 97.

⁶⁰ The recommendation was made in a discussion paper on a model criminal code was prepared by the Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General of Australia. In its Final Report the Committee noted: "This recommendation was greeted with a great deal of opposition. Unfortunately, much of that reaction was based upon a misconception. In particular, many members of the community believed that the Committee was recommending that it should be lawful for an adult parent to have sexual contact with his or her child who is under the age of consent. Of course, the committee recommended nothing of the sort. The discussion paper sought to make clear that sexual contact by adults with children (whether there existed between them a relationship of consanguinity or not) must be prohibited and harshly penalised." (Model Criminal Code Report (1999), p 193.)

The Commission then was faced with a strategic issue about the possible impact of a recommendation to abolish incest on the whole project. A significant part of any law reform project is to gauge the likely reactions to the recommendations it contains, and it was not too difficult to guess that a proposal on abolishing the crime of incest would be misunderstood or misinterpreted, and would be likely to dominate media and political reaction and discussions. If that were so, what would happen to the rest of the project?

Various considerations were involved here. One primary point was that as no specific proposal had been formulated there was as yet no guarantee that Commission itself would be unanimous in accepting that incest should no longer be a crime. Another, and more significant, consideration was that any such proposal was not a core part of the whole set of recommendations. Furthermore, the existing law reflected recommendations for reform made by the Commission itself in a previous project.⁶¹ If the Commission were minded now to propose the removal of the offence of incest, the chances of that proposal being enacted were remote, certainly unless considerable effort were made in the Report and during the parliamentary process of showing why this proposal was justified. But any such effort would deflect from making the case for what was thought to be more central parts of the project, especially the consent model and the introduction of specific 'no consent' offences. In short, there was a danger that not only would a proposal on incest not be enacted but it might bring with it non-implementation of other recommendations. On this particular topic, the Commission's view was that as razors are made to sell and bill are made to pass, law reform projects are made to be implemented.

The decision not to make any recommendation for reforming the law of incest represents both a pragmatic and strategic approach to law reform. The project was not attempting to produce a complete code of sexual offences. As noted earlier, some crimes which could be classified as sexual offences were not subject to scrutiny or recommendation. Priority was given to the areas of the law on sexual offences which were most in need of reform now. This approach was not intended to signal that the Commission saw the law on sexual offences not covered in this project as satisfactory. The aim rather was to produce a set of proposals on some crucial issues which would have a more than good chance of being put on the statute book and as a consequence some topics were not considered.⁶² But that does not preclude their consideration, whether by the Commission or in some other way, at a later date.

4. Clarity of the law

Whatever else is involved in law reform, one aim must be to make the law clear. Indeed one of the statutory duties of the Scottish Law Commission is to propose reforms with the view to "the simplification and modernisation of the law."⁶³ For the law to regulate people's conduct, it must be understandable, and this is especially so in the case of criminal law, where failure

⁶¹ *Report on the Law of Incest in Scotland* (Scot Law Com No 69) (1981), The Commission's recommendations were implemented in the Incest and Related Offences (Scotland) Act 1986. The relevant provisions are now contained in the Criminal Law (Consolidation) (Scotland) Act 1995, ss 1-3.

⁶² The Discussion Paper considered the offence of bestiality but the Report contained no proposal for change of the law. The Report also suggested that consideration should be given to creating an offence of unlawful interference with human remains but as this offence was not to be limited to interference of a sexual nature no detailed recommendation was made.

⁶³ Law Commissions Act 1965, s 3(1).

to conform can lead to prosecution, conviction and criminal sanction. The need for clarity in the criminal law is an important principle of the European Convention on Human Rights.⁶⁴

Certainly many aspects of the common law of sexual offences infringed the requirement for clarity, especially in relation to the open-ended way in which some offences were defined.⁶⁵ In this project the Commission's hope was that all of its recommendations for reform would promote clarity and certainty but for several issues in particular this value played a significant role.

One example is whether or not consent should be defined. Under the common law consent played a key part in the law of rape. Until the *Lord Advocates Reference* decision,⁶⁶ the presence of consent had been a defence to a charge of rape,⁶⁷ and after that case the lack of consent was a core element of both the actus reus and the mens rea of rape. It might therefore be thought that the law would be attentive to making clear what consent means in this context. However, that is not what Scots law had done. Indeed it has been held that a judge need not provide the jury with a definition of consent.⁶⁸ The Commission's view was that this position was untenable and almost any definition was better than none at all. This view received strong support from all but one of the consultees.

Another example of providing certainty in the law related to the law on sado-masochistic practices. In the Discussion Paper the Commission recommended that assaults made for sexual purposes with the consent of the participants should not be criminal provided that no serious injury would result. This proposal received widespread support among our consultees but some argued that it was unnecessary as it simply reflected existing police and prosecution policy. But the Commission was not convinced by this view. Its preferred approach was that the law should make it absolutely clear, especially to anyone wishing to engage in sadomasochism, what the law did, and what it did not, allow. However, the Commission's recommendation that the law on this matter should be clarified was not implemented in the Act and it is instructive to consider what happened.

Of course, reforming the law on sadomasochism was also justified on some of the other guiding principles. The fundamental principle was the need to respect and promote sexual autonomy but for this principle to be applicable it had first to be decided whether the law here was dealing with sexual conduct. Often this issue is discussed in the context of the

⁶⁴ Article 7. In *Silver v United Kingdom* (1983) 5 EHRR 347, para 88, the European Court stressed that while Convention rights may be subject to limitation by the 'law': "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree which is reasonable in the circumstances, the consequences which a given action may entail."

⁶⁵ An example is the common law offence of lewd, indecent or libidinous behaviour, which consisted of a range of types of indecent conduct against children. In *Webster v Dominick* 2005 1 JC 65, the Court stated (para 49) that the "essence of the crime is the tendency of the conduct to corrupt the innocence of the complainer". In its Report the Commission recommended that this crime should be abolished and replaced by more specific offences, such as causing a child to participate in, or be present during, a sexual activity, and causing a child to look at a sexual image.

⁶⁶ *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466.

⁶⁷ Consent was treated as a quasi 'special defence' under section 78 of the Criminal Procedure (Scotland) Act 1995, thus requiring advance notice of raising the defence. Section 149A applies a similar rule for summary cases.

⁶⁸ In *Marr v HM Advocate* 1996 SCCR 696, a jury in a trial on a charge of indecent assault had asked for guidance on the meaning of consent. The trial judge's response was that the "definition of consent is a common, straightforward definition of consent. It's the common English word given its normal meaning. And that I am afraid is it. Consent is consent." On appeal the Court held that this response was correct and that it was not necessary for the jury to be given any further direction on the matter.

general crime of assault rather than as a sexual offence.⁶⁹ However, it is clear that the purpose of at least some sadomasochistic conduct is for the participants to achieve sexual gratification.⁷⁰ The Commission concluded that the better perspective was to locate these practices as a form of sexual conduct. As the exercise of sexual autonomy in this context involved the use of violence on other people it was necessary to formulate appropriate limiting factors. These factors were that there had to be consent by all the parties involved, the conduct was of a degree that was unlikely to result in serious injury, and its purpose had to be providing sexual gratification for one or more of the people involved.

Having consulted on this basis without any major objections this was not a recommendation which the Commission expected any problem in its implementation. But the proposal did not even make it to the Bill presented to the Scottish Parliament. After the Commission had finished its report, the Scottish Government carried out a further round of consultation on what any implementing bill should contain. One particular line of response to that consultation was that the proposals on sadomasochism could present a loophole for perpetrators of domestic violence who could claim that the violence was done to achieve sexual satisfaction and with the consent of the person being attacked.⁷¹

It is difficult to know what to make of this argument, which had not been raised during the Commission's own consultation. False claims that a complainant had given consent to an activity could as easily, and more likely, arise in the context of rape and sexual assaults, but that is hardly a reason for not using the presence of consent to remove criminal liability. More significantly, this argument refuses to engage in the issue of principle about respecting sexual autonomy. Why should the law criminalise the activities of people who derive sexual pleasure from consenting acts of violence, while allowing a whole range of other consenting sexual acts? It is difficult not to conclude that the decision to omit the recommendations on sadomasochism was not based on any aspect of sexual autonomy but on an unarticulated appeal to legal moralism.⁷²

In addition this omission leaves the law unclear. Someone who wishes to engage in sadomasochism for sexual purposes should be able to find out to what extent the law allows such conduct. Probably some forms of this behaviour are permitted and others are not, but it is uncertain where the line is drawn.⁷³ Leaving the law in a state of such uncertainty is not a satisfactory approach to law reform.

This example illustrates a recurrent problem with law reform projects, namely ensuring that the consultation process reaches a full range of possible respondents. Normally once the Commission has submitted its final report on a project to the Scottish Government, the

⁶⁹ The topic is not dealt with in the Sexual Offences Act 2003.

⁷⁰ The characterisation of sado-masochistic practices as sexual rather than violent in nature is discussed in L Bibbings and P Alldridge, "Sexual Expression, Body Alteration, and the Defence of Consent" (1993) 20 *Journal of Law and Society* 356, N Bamforth, "Sado-Masochism and Consent" [1994] *Crim L Rev* 661, and S Cowan, "The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic 'Assaults'" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010), 126.

⁷¹ This argument was foreshadowed in P Ferguson, "Reforming rape and other sexual offences" (2008) 12 *Edinburgh Law Review* 302, 306-307.

⁷² One respondent to the Scottish Government's response, who did not respond to the Commission's Discussion Paper, stated that "The distortion of acceptable sexual activity has wider social repercussions than those for the particular participants. Sadomasochistic activity is intrinsically disordered and introduces violence to an aspect of intimate personal life. The law must protect society from the danger of violence being accepted as a legitimate part of sexual relationships." (Quoted in SPICe Briefing Paper 08/48 (17 September 2008) on the Sexual Offences (Scotland) Bill.)

⁷³ In *Smart v HM Adv* 1975 JC 30, it was noted that sexual touchings did not amount to assault where the other party consented but no guidance was given as to what such touchings included.

Government in turn has a further round of consultation which sets out its preliminary views on which of the Commission's recommendations it proposes to implement or not to implement. But the Government consultation sometimes attracts responses from people or organisations who did not respond to the Commission's own consultation. This creates a difficulty for the Commission in that it cannot take a position on issues or points of view (such as the argument about the loophole that would arise from legislating on sadomasochism) which the Commission had not itself identified or had not been raised during its own consultation process.⁷⁴

5. Distinctions based on gender or sexual orientation

Another of the Commission's guiding principles was that the law on sexual offences should not involve distinctions based on sexual orientation or types of sexual practice. An allied point is that the criminal law on sexual offences should, as far as possible, not make distinctions based on gender. Again, this principle is one which is recognised in the ECHR.⁷⁵

In this project the most obvious area for applying this principle was in relation to homosexual offences, which in Scots law applied mainly to actings between men but not similar actings between women. The old law had been modified, but not abolished, by a statute in 1980, which de-criminalised certain forms of consenting male homosexual conduct. However, the general framework of the old law remained.⁷⁶ The Commission proposed that all existing offences, including any common law crimes, which relate to homosexual conduct should be removed.⁷⁷

It is a sign of change in social attitudes that these proposals were supported by consultees with only one dissent and that they attracted virtually no discussion during the parliamentary process.

A further example of the current law making distinctions based on gender was the set of statutory rules which seeks to protect children. As a matter of historical development, different rules applied to the protection of boys from those for the protection of girls, and the range of protection given to girls was different from that given to boys. Indeed some of the protective offences could only be committed by a man and not by a woman. The Commission found this approach unprincipled and unsatisfactory. Where the protective principle was to apply the same protection should be given to boys and girls and it should not matter whether children were to be protected against men or women. Accordingly, the Commission proposed that the law on sexual offences relating to children should not make

⁷⁴ A further example of this problem is discussed later in respect of the principle of using types of intervention other than the criminal law.

⁷⁵ Article 8 (right to respect for private life). In *Sutherland v United Kingdom* (App No 25186/94, 1 July 1997) at para 36, the European Commission of Human Rights held that different minimum ages for legalised heterosexual and homosexual activity breached the right to respect for private life guaranteed under Article 8, taken in conjunction with Article 14 (prohibition of discrimination). *SL v Austria* (2003) 37 EHRR 39 suggests that any law based on the protective principle must apply equally to heterosexual and as well as homosexual conduct.

⁷⁶ A particular example was the very odd provision whereby some (but not all) homosexual acts were criminalised if not done in 'private', which was expressly defined as not including public lavatories (Criminal Law (Consolidation) (Scotland) Act 1995, s 13(2)(b)). There seemed to be no such 'private' restrictions on heterosexual acts. The Commission noted that any wrong in this situation was an affront to public decency but this would apply equally to heterosexual and homosexual activities.

⁷⁷ There was no repeal of provisions in section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 (which criminalised various homosexual activities) in relation to procuring and trading in prostitution and brother keeping. These provisions were in broadly similar terms to other statutory provision in relation to heterosexual conduct.

any distinction in terms of the gender of the child or of the perpetrator of such offences. This was a proposal which was accepted without dissent by consultees and in Parliament.

A similar sort of approach informed the Commission's view that at least some types of sadomasochism should be characterised as sexual conduct. It followed that there should be no discrimination against the approach of the criminal law in respect of this particular type of sexual conduct as compared with other types. The failure to implement the Commission's proposals on sadomasochism was a breach of this general principle.

A final point about the principle of gender neutrality and removing distinctions based on sexual orientation which did attract some comment concerned the definition of rape, and in particular confining that crime to penile penetration. As will be discussed later, the exact scope of the crime of rape was a matter to which the Commission paid considerable attention. Ultimately it reached the conclusion that there was a specific type of wrong in a (non-consenting) penetration by another person's sexual organ and that rape should be defined in that way. But did this proposal breach the principle of gender neutrality? It is difficult to see that it does. Technically, the new law does not say that only a man can commit rape; rather only a person with a penis can do so, which is not quite the same thing. Moreover, the new crime of rape applies to both male and female victims.

6. Other types of legal and social intervention

The Commission was very much aware that the project was concerned with reforming a part of the criminal law. However, it equally recognised that not all legal regulation of sexual conduct needs to be done by way of the criminal law, and other types of legal process may be a more appropriate way of dealing with problematic sexual conduct.

One particular and socially significant topic where this consideration proved crucial concerned proposals for protecting children. As noted earlier, the Commission recommended two different sets of provisions. The first was related to children under 13 years old. Here the law was to impose strict liability for any form of sexual contact with a child in this age bracket. The second concerned 'older' children, namely those aged between 13 and 16, where there should remain offences prohibiting sexual contact with a child of this age, even if the child consented to it (though there would be defences such as reasonable mistake as to the child's age).

A particular problem arises in applying sexual offences relating to consensual sexual activity with children where the participants are themselves older children. It was far from obvious that these activities were exploitative in nature. Indeed, the Commission noted that for many teenage children sexual exploration is regarded as a normal part of growing up.⁷⁸ If so, what (if any) sort of social wrong was involved here and did it require the intervention of the criminal law?⁷⁹

⁷⁸ See J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] *Criminal Law Review* 347, at 354, (referring to K Wellings et al, *Sexual Behaviour in Britain: The National Survey of Sexual Attitudes and Lifestyles* (1994), p 40.)

⁷⁹ A point made vividly by Spencer, op cit, at 354 in relation offences in English law: "The 'legislative overkill' point is that the child sex offences cover not only consensual sexual acts between children and adults, but all forms of sexual behaviour between consenting children. The result is to render criminal a range of sexual acts, some of which are usually thought to be normal and proper, and others at least not seriously wrong. ... So far are these

In the Discussion Paper the Commission recommended that there should nonetheless still be offences where older children had consent-based sex with each other. It had in mind the operation of the children's hearing system, one effect of which was that where a child committed a crime the outcome would rarely be a criminal prosecution and many cases would lead to a referral to a hearing.⁸⁰ So the proposal at that stage of the project was to let the children's hearings system continue to deal with any case where legal or social intervention was called for in respect of consenting sexual conduct between children aged 13 to 16. Having such activity as a crime was seen not so much as a matter of criminalisation as such, leading to prosecution and conviction, but rather as a pathway to the hearings system. The advantage of proceeding in this way was that the practical effect would be that in the vast majority of cases criminality would not be attached to consenting sexual activity between under-16 year-olds. Yet at the same time prosecution in the criminal courts could still be brought in those rare situations where there was a public interest in doing so.

However, this was a topic where the response to consultation led the Commission to reconsider its views. Several consultees representing children's welfare considered that it was inappropriate to label children in this situation as criminal at all; another respondent pointed out that the existence of the children's hearing system was not a good argument for determining what conduct should be criminal. Significantly, the body representing the reporters to the children's hearings disagreed with the proposal, saying that the focus should be on ensuring that where a child's sexual behaviour gave rise to concern over the child's welfare there must be a clear mechanism for that child to be referred to a hearing.

The Commission was persuaded that the initial proposal was wrong and that it should change its mind. This, after all, was the point of putting initial proposals for reform out to consultation. The basic idea behind the proposal was that consenting sex between older children should not, for almost all cases, be criminal but should where appropriate (namely a welfare issue was involved) be a ground for referring a child to a children's hearing. But on further reflection this approach seemed wrong. It is not good law reform to make conduct criminal in the knowledge that it would never, or hardly ever, be prosecuted. If older children were to be referred to a children's hearing because of their (consenting) sexual conduct there should be a ground of referral directly on that basis.

In addition, there was concern that criminalising all forms of consenting sexual conduct between older children might send out the wrong message. What would a 15-year old boy think of a law which said that kissing his 14-year old girlfriend was a crime, and then be told that although it was a crime he would not be prosecuted for it? Such an outcome would be likely to bring the criminal justice system into disrepute.

However, these arguments did not convince the Government who, after their own pre-Bill consultation, decided that some but not all sexual contact between older children should be made criminal.⁸¹ The main driving force behind this decision was a belief that the criminal law

provisions of the Act out of line with the sexual behaviour of the young that, unless they provoke a sexual counter-revolution, they will eventually make indictable offenders of the whole population."

⁸⁰ In an earlier project on the age of criminal responsibility, the Commission estimated that in the period between 1994 and 2000 over 99% of children alleged to have committed a crime were dealt with in the children's hearings system, and less than 0.5% were prosecuted in the criminal courts (Report on *Age of Criminal Responsibility* (Scot Law Com No 185 (2002), para 3.10).

⁸¹ Those opposing the Commission's proposal included a majority of religious/faith organisations and "the vast majority of individual respondents many of whom appear to have been responding as a result of campaigning by the Christian Institute." (Sexual Offences (Scotland) Bill Policy Memorandum (2008), para 111.)

should not be seen as encouraging sexual activity, even on a consenting basis, among under-16s and that a protective principle could apply where a child consented, as is the case where a person over 16 has consenting sex with an older child. The Commission's proposal could be perceived as a lowering of the age of consent, which by itself could send out the wrong signals to older children.⁸²

One difficulty with this approach is that it could apply to all types of sexual contact between older children, so the crime was limited to what the Government called sexual intercourse. However, the ultimate version of the crime in the 2009 Act includes some other forms of sexually penetrative conduct.⁸³

I do not wish here to discuss the details of the new offence⁸⁴ but rather want to comment on some of the arguments which led to Government abandoning the Commission's recommendations. The view that the Commission's proposals would involve a lowering of the age of consent is misconceived, and it is far from clear why the Government gave any weight to this point. Where an older child does not consent to sexual activity, then the conduct is caught by the general provisions on rape, sexual assaults and related offences in sections 1-9 of the 2009 Act. The bulk of the protective offences in respect of older children only apply where the child had as a matter of fact consented (or the Crown cannot, or do not wish to, prove lack of consent). The focus of these offences is on the person over the age of 16, who does not escape criminal liability for sexual conduct with a consenting older child. Not extending criminal liability to consenting sex where both parties are older children does not change this point. What the Commission recommended was in essence a form of immunity for both children in this situation but what the Act does is to impose criminal liability on each of them.

The Government and the Commission also disagreed on the message or interpretation which older children would make of a law on criminalising or not criminalising consenting sex. The Government's view was that if the criminal law did not prohibit such activity it would be read as condoning, and hence encouraging, teenage sex. There is no clear empirical evidence in either direction,⁸⁵ but it does seem far-fetched to say that teenagers typically regard the law as a primary guide to their behaviour. More to the point, what message is sent out by the provisions of section 37 itself? Many forms of sexual conduct, which if they are done without consent of one of the parties or carried out between an over-16 year-old and an older child, constitute offences, but are not criminal under section 37.⁸⁶ If

⁸² Policy Memorandum, para 119.

⁸³ 2009 Act, s 37. Mouth-to-mouth kissing is not covered by this provision nor is digital penetration. An oddity of the offence is that it involves two levels of criminality. Where a 15 year old boy has sexual intercourse with a 15 year old girl with her consent, both the boy and the girl commit the section 37 offence. Where one of the parties does not consent then the offence is superfluous, as the conduct falls within the scope of no-consent offences.

⁸⁴ A topic well covered in Alastair Brown, *Sexual Offences (Scotland) Act 2009*, pp 62-64.

⁸⁵ As the Government accepted (Policy Memorandum, para 119). Some of the responses to the Justice Committee's call for evidence suggested that there is a wide variety of factors that lead children to have sex at an early age.

⁸⁶ These include:

- some types of sexual assault by penetration and engaging in penetrative sexual activity with an older child (sections 2 and 29);
- some forms of sexual assault and engaging in sexual activity with an older child (sections 3 and 30);
- sexual coercion and causing an older child to participate in a sexual activity (sections 4 and 31);
- causing a person or older child to be present during a sexual activity (sections 5 and 32);
- causing a person or older child to look at a sexual image (sections 6 and 33);
- communicating indecently with a person or older child (sections 7 and 34);
- sexual exposure to a person or older child (sections 8 and 35); and
- voyeurism towards a person or older child (sections 9 and 36).

the criminal law on sexual offences is sending out any message to under-16s about the propriety of under-age sex, it must be a somewhat confusing one.

A further problem with the provision is the fundamental one which concerned the Commission: was the offence constituted by section 37 to be subject to the normal practices of investigation and prosecution, or was the intention that intervention by the criminal justice system was to be rarely used? The latter involves the wrong approach of law reform of making new laws but not implementing them but that is what seems to have been the thinking behind this provision.

Furthermore, if some forms of consenting sexual conduct between older children do give rise to concerns about the welfare of the children involved then the law in the 2009 Act is the worst of all worlds. The Government decided that as it was not intending to implement the Commission's recommendation about not imposing criminal liability for older children sexual activity, then there was no need to implement the Commission's further and related recommendation that there should be a new ground for referral to a children's hearing system that a child has been engaged in sexual activity with another person. This decision was presumably made on the basis that the only type of sexual activity which could give rise to child welfare concerns were those covered by section 37, which in turn would lead to a referral on the ground that the child had committed a criminal offence. This is questionable. Many of the types of consenting sexual conduct not criminalised by section 37, for example sexual penetration and touching, or causing an older child to engage in or be present during sexual activity, could just as easily involve welfare issues but in such cases there would be no ground of referral based specifically on the sexual conduct.⁸⁷

The partial criminalising of consenting teenage sex illustrates further problems about law reform. In my view, the Commission were absolutely correct to change its mind after considering well-argued responses to its preliminary proposals on this topic. The consultation process is a vital part of any law reform exercise, so it is crucial that in preparing its consultation at the discussion paper stage the Commission identifies all possible perspectives and comments on them in order to allow for meaningful and reasons-based responses. I am sure that on this issue the Commission did set out a full account of what the problems were and the possible solutions. The difficulty from the perspective of conducting a law reform project was rather that the consultation did not draw responses from all possible interests. For example, as the project clearly raised social and moral issues, copies of the discussion paper were sent to the Churches and other religious organisations. None responded to the Commission but many had an input to the Scottish Government's own consultation and during the Parliamentary passage of the Bill. This gives rise to a concern that bodies with an important input into a law reform project may either misunderstand the role of the Scottish Law Commission, or, perhaps more worryingly from the Commission's perspective, prefer to ignore the Commission and make their views known only to the Government and the Parliament.

7. Classifying sexual offences according to the type of wrong

A final consideration in the Commission's formulations for the reform of the law was the principle that sexual offences should be categorised according to the type of wrong involved.

⁸⁷ No ground of referral on this basis was added to the revised grounds of referral in section 67 of the Children's Hearings (Scotland) Act 2011.

Many would recognise this principle as involving fair labelling but that concept is more extensive than characterising and individuating criminal offences.⁸⁸

One particular area where the application of this guiding principle played a major role in the formulation of the Commission's proposals was in the respect of rape and related types of sexual assault. In the Discussion Paper the Commission made a number of different but overlapping recommendations on these issues. There was virtually unanimous acceptance of these proposals by consultees. Where there were different points of view these reflected disagreement not on the content of the law but on the implications of a labelling approach. The response of consultees to these issues does indicate the importance attached to classifying and naming offences. Here I will note some of the proposals and add some brief comments showing how classifying according to the type of wrong was at the basis of the Commission's thinking.

Rape and similar sorts of sexual assaults should be part of a separate category of the criminal law and should not be subsumed within the offence of assault.

One approach to offences such as rape and sexual assault is to classify them as essentially acts of violence and therefore as falling within the general law of assault. One justification for this approach is that victims might be more willing to report instances of assault, including those with a sexual element, than they would a crime of rape. Moreover, Scots common law adopted a position very much on these lines. Apart from the crime of rape (which was very narrowly defined at a common law), there was no other offence of sexual assault. All other types of sexual attack fell within the category of indecent assault, which was classified as the crime of assault aggravated by circumstances of indecency.⁸⁹

The Commission saw little merit in this approach. I have noted earlier that the Commission wished to move the law in the opposite direction in respect of sado-masochism, which it proposed should be characterised as a form of sexual activity. But the main problem in taking rape and sexual assaults as crimes of violence was that it might encourage the view that non-violent rape was not 'real' rape. Furthermore, the specific wrong with sexual assaults is that they involve not just an attack on the victim's physical integrity but also on their sexual autonomy, and there should be a separate class of offences which reflects this type of wrong. Another point was that by not having a distinct category of sexual assault, a distinction would result in breaches of sexual autonomy which involved assault and those which did not. The Commission was also proposing the creation of coercive sexual offences which did not involve direct contact between the perpetrator and victim (eg by forcing someone to watch a sexual act or indecent image). But these coercive offences were based on the lack of the victim's consent, which was also a key element of sexual assaults. The law should reflect the unifying element of these offences, all of which involved breaches of sexual autonomy where a person had not consented to sexual activity.

There should be different offences within the general category of sexual assault.

If there were to be a category of sexual assault which was not part of the general law of assault, should there be further distinctions between different types of sexual assault? The Commission was not in favour of an undifferentiated offence of sexual assault, precisely for the reason that it failed to mark out distinctions between different ways in which a person's

⁸⁸ James Chalmers & Fiona Leverick, "Fair Labelling in Criminal Law" (2008) 71 *Modern Law Review* 217.

⁸⁹ *Grainger v HM Advocate* 2006 JC 141, 145.

sexual autonomy could be breached. This was a problem with the common law crime of indecent assault which could range from a forced penetration of a person's mouth or anus with a penis or an object to the touching of a woman's breasts to an uninvited kiss. In addition, having only one category of sexual assault would pose problems for naming the offence. Unless every possible type of sexual assault was called rape, the consequence would be that there would be no offence known as rape in Scots law. This was not option which the Commission wanted for our criminal law.⁹⁰

Sexual assaults involving penetration of the victim's body should be a separate offence from those not involving penetration.

A distinction is made in other legal systems between sexual assaults which involve the penetration of the victim's body and those which do not.⁹¹ And there are good reasons for making this distinction. A sexual attack which penetrates the victim is a distinctive manner of breaching the victim's sexual autonomy. This is not to say that all penetrative assaults are worse than all non-penetrative assaults. Often they are but it need not always be so. The point here is not to create a hierarchy of offences based on the seriousness of the attack, Rather what the law of sexual assaults should reflect is the different types of wrong involved in penetrative and non-penetrative attacks

There should be a distinction within penetrative sexual assaults based on whether the penetration was or was not with a sexual organ.

The same approach was taken in proposing a further distinction based in whether the penetration had been with a penis or with something else. There is an added dimension to a penetrative sexual attack where someone has been penetrated with another person's sexual organ, which in effect means with a penis. Again, the point was not to imply that penile penetrations are always worse than non-penile penetrations. What the distinction was trying to capture was that there is a different form of wrong to the victim in the two situations.

The outcome of this application of the guiding principle of classifying offences according to the type of wrong involved was that in the Discussion Paper the Commission proposed a three-fold division of sexual assault. The first type was rape (defined as penile penetration of the victim's vagina, anus or mouth); secondly, sexual assault by penetration (defined as non-penile penetration of a person's vagina or anus (but not penetration of the mouth); and thirdly a residual category of non-penetrative sexual assault involving sexual touching or contact.

These proposals were overwhelmingly accepted by consultees. However, the Commission changed its mind on one of them. Instead of the three-fold division it now recommended that there should be two types of assault offence, namely rape and sexual assault. This latter category would include non-penile penetration. One concern was that the proposed offence of non-penetrative assault did not include penetration of the victim's mouth, as some instances of oral penetration would be much less serious than others (eg an unwanted kiss).

⁹⁰ Some legal systems had dropped the term rape from its law of sexual offences. The Commission opposed this approach mainly for the reason stated by the Law Reform Commission of Victoria that the "main argument for retention regardless of the form and substance of the law is that the term 'rape' is synonymous in our culture with a particularly heinous form of behaviour." (Discussion Paper on *Rape and Allied Offences: Substantive Aspects* (LRCV No 2 (1986)), p 51.)

⁹¹ For example, in English Law. Section 1 of the Sexual Offences Act 2003 defines rape as penetration with a penis, and section 2 defines assault by penetration as a form of assault with a part of the body or with anything else. Section 3 creates the offence of sexual assault by touching.)

My own view at the time was that the Commission should keep to its original proposal and that the revised scheme paid too little attention to the labelling principle. But I was unable to persuade my colleagues and to avoid lack of unanimity I (reluctantly) accepted the new recommendation.

However, the Commission's original argument prevailed during the legislative process. In the light of submissions made to the Justice Committee, which largely reflected the approach in the Commission's Discussion Paper, the Justice Committee recommended that there should be an offence of sexual penetration (of the anus or vagina) distinct from rape and sexual assault as such. A Government amendment was made to the Bill to give effect to this recommendation.

Conclusion

From the perspective of law reform the Scottish Law Commission's project on rape and sexual offences was a success. The vast majority of its initial proposals were accepted by consultees and almost all of its final recommendations were implemented in statute. What this paper has tried to show is the overriding importance of a law reform body identifying and applying the appropriate guiding principles for projects which involve controversial social or political issues. I have attempted to demonstrate that the seven principles used in the sexual offences project did inform the Commission's entire thinking in formulating its recommendations.

But there are other dimensions of a law reform project. Some projects will not involve these types of issues but others (and these are perhaps more common than may be thought) will have a wider political context. Law reform bodies should not shy away from projects of this nature. As these are more likely to be the result of a Government reference than an item in its programme of law reform, initial discussion with the Government in setting up the project and establishing its terms of reference will point to the parts of the project which are likely to attract wider political interest.

The deployment of the guiding principles in formulating the Commission's initial proposals plays a significant role in the crucial part of any project, namely consultation. If arguments and ideas are incomplete when the consultation is made, new perspectives which may have wider implications for more than one proposal could arise for the first time at a late stage in the project. This sexual offences project illustrated a further problem in that some potential consultees did not respond to the Commission's proposals but delayed making their comments until after the Commission had finished the project.

Finally, law reform bodies must be pragmatic. This has two implications. Where a particular proposal is likely to be so controversial that it has little chance of being implemented a decision has to be taken whether it is worthwhile continuing with that proposal. On the other hand, where a proposal is a key part of the project, then the chances that it will survive post-Report opposition will largely depend on the strength of the ideas and principles on which it is based.